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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 660

HENRIK MANNERFRID, PETITIONER

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 25–28) is reported at 238 F. 2d 32. The opinion of the District Court (Pet. 23–25) is reported at 145 F. Supp. 55.

JURISDICTION

The judgment of the Court of Appeals was entered on October 18, 1956 (Pet. 29). The petition for a writ of certiorari was filed on December 28, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the question of petitioner's lawful admission to this country, for the purposes of the present

deportation proceeding against him, was rendered *res adjudicata* by a previous federal court decision in a naturalization proceeding in which the introductory statement of facts mentioned that he had been lawfully admitted, but in which the sole issue adjudicated was petitioner's ineligibility for naturalization.

2. Whether an administrative ruling by a prior Attorney General, which was in effect subsequently held by a judicial determination to have been erroneous, can estop the government, on theories of equitable estoppel or *res adjudicata,* from now deporting petitioner whose deportation is commanded by statute.

3. Whether the deportation proceeding was unfair because of the possible failure of the special inquiry officer to read a 2½-page brief and hear argument on a legal question which was fully briefed and argued before the Board of Immigration Appeals.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the Immigration and Nationality Act of 1952, 66 Stat. 204, 208, 209–210, 8 U. S. C. § 1251 (a) (1) and (d), 1252 (b), provide:

> SEC. 241. (a) Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—
>
> (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry * * *.
>
> * * * * *
>
> (d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a),

notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.

* * * * *

SEC. 242.

* * * * *

(b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present * * *. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

* * * * *

The pertinent portions of the Immigration Act of 1924, ch. 190, 43 Stat. 162, et seq., provided:

SEC. 13.

* * * * *

(c) No alien ineligible to citizenship shall be admitted to the United States * * *.

* * * * *

SEC. 28.[1]

* * * * *

(c) The term "ineligible to citizenship", when used in reference to any individual, includes an individual who is debarred from becoming a citizen of the United States under * * * section 3 (a) of the Selective Training and Service Act of 1940, as amended * * * or under any law amendatory of, supplementary to, or in substitution for, any such sections.

The pertinent portion of the Selective Training and Service Act of 1940, ch. 720, 54 Stat. 885, as amended by the Act of December 20, 1941, ch. 602, 55 Stat. 845, provided:

SEC. 3 (a). Except as otherwise provided in this Act, every male citizen of the United

[1] As amended by the Act of October 29, 1945, ch. 437, 59 Stat. 551.

States, and every other male person residing in the United States, who is between the ages of twenty and forty-five at the time fixed for his registration * * * shall be liable for training and service in the land or naval forces of the United States: *Provided*, That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if * * * he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States * * *.

8 C. F. R. (1952 ed.) § 242.53 provides:

Conduct of hearing—

* * * * *

(b) *Special inquiry officers; general duties.* The special inquiry officer shall conduct a fair and impartial hearing * * *. He shall exclude from the record any evidence that is irrelevant, immaterial, or unduly repetitious. In his discretion, he may exclude from the record any argument in support of objections, but in such event, the respondent may submit a brief in support of such objections * * *.

(c) *Special inquiry officers; specific duties.* At the commencement of the hearing under this part, the special inquiry officer shall (1) place the respondent under oath * * * (2) advise the respondent of his right to representation * * * by counsel * * * (3) enter of record a copy of the warrant of arrest and explain to the respondent in simple, understandable

language the nature of the charges contained * * * in the warrant of arrest * * *.

* * * * *

(g) *Representation by counsel.* If the respondent is represented at the hearing by an attorney * * * the attorney * * * shall be permitted to be present during the entire hearing, to introduce evidence in behalf of the respondent and to cross-examine witnesses. The attorney * * * shall be permitted to state his objections succinctly, and they shall be entered on the record * * *.

8 C. F. R. (1952 ed.) § 242.61 provides:

Decision of special inquiry officer—(a) *Preparation of written decision* * * * the special inquiry officer shall, as soon as practicable after the conclusion of the hearing, prepare a written decision signed by him which shall set forth a summary of the evidence adduced and his findings of fact and conclusions of law as to deportability * * *.

8 C. F. R. (1952 ed.) §§ 6.1 and 6.11 provide:

§ 6.1 *Board of Immigration Appeals*—

* * * * *

(b) *Appellate jurisdiction.* Appeals shall lie to the Board of Immigration Appeals from the following:

* * * * *

(2) Decision of special inquiry officers in deportation cases, as provided in § 242.61 of this chapter;

* * * * *

(e) *Oral argument.* Oral argument shall be heard by the Board upon request, in any case

over which the Board acquires jurisdiction by appeal * * *.

* * * * *

§ 6.11. *Notice of appeal*—(a) *Written decision.* Whenever an alien * * * affected by written decision is entitled under this chapter to appeal to the Board, he shall be given written notice that he may appeal from such decision * * *. The party taking the appeal may file with the Notice of Appeal a brief in support of his appeal * * *.

STATEMENT

This declaratory judgment proceeding was instituted in the District Court for the District of Columbia for the purpose of obtaining a judgment that petitioner is a lawful permanent resident of the United States, not subject to deportation (R. 1–2). Respondent's motion for summary judgment was granted by the District Court (Pet. 25), and the decision was affirmed on appeal (Pet. 28–29).

Petitioner, a native and citizen of Sweden, first entered this country in 1941 as a visitor for business purposes (R. 23), and obtained several extensions of his temporary stay until 1947 (R. 23). In 1943, he obtained relief from military service on the ground that he was a neutral alien under Section 3 (a) of the Selective Service and Training Act of 1940, as amended (*supra*, pp. 4–5) (R. 33, 39–40). On the application form, D. S. S. Form 301, appeared the statement that petitioner knew his application would debar him from citizenship (R. 40).

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In a letter accompanying the request for relief (R. 41–42), petitioner stated that he intended to return to Sweden, and:

> I also want to state that if I would not have filed this application and joined the American forces, I would automatically have become a United States citizen and as a United States citizen I would be a foreigner in my own country, and as a foreigner I am not allowed to control any Swedish company or own real estate without certain permissions. * * *

In 1948, deportation proceedings were instituted against petitioner on the ground that he had remained in the United States beyond the time to which his temporary stay had been extended (Immigration file EO86415, document marked Ex. 3 in deportation proceedings of July 14, 1953).[2] He applied for pre-examination[3]—to determine his admissibility to the United States for lawful permanent residence—and for permission to depart voluntarily to Canada for the purpose of applying at the American consulate for an immigration visa (R. 8). Petitioner's application was granted in February 1949 by Attorney General Clark who stated (R. 42–43):

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[2] Immigration file EO86415 of Henrik Mannerfrid was made a part of the pleadings in the District Court (R. 11–12) and is a part of the record here. It has no continuous pagination.

[3] Pre-examination was a procedure authorized by regulation (8 C. F. R. (1949 ed.) § 142) by which aliens in specified categories *already in the United States*, who intended to apply to a consular officer in Canada for immigration visas for entry into the United States for permanent residence, were given the same type of inspection accorded incoming aliens in order to determine their admissibility prior to their departure.

> Upon the unique and specific facts as set forth in the file of this case, it is found that the alien is not ineligible to citizenship or admission for permanent residence for having filed D. S. S. 301 under mistake.

Petitioner was admitted to the United States for permanent residence on April 5, 1949[4] (R. 8, 19, 21, 22).

In 1951, petitioner, who had married an American citizen, applied for naturalization (R. 18–22). The naturalization examiner recommended denial of the petition because of the relief from military service (R. 33, 34). The Commissioner of Immigration and Naturalization, consistently with the Attorney General's prior ruling, recommended that the petition be granted on the ground that the application for relief from service had been made under a mistake of fact (R. 37–39). References were made in the recommendations to the fact that petitioner had been admitted for permanent residence, although all stated that the issue in the case was petitioner's eligibility for naturalization (R. 23–24, 31, 34–35). The District Court for the Southern District of New York ruled that petitioner was debarred from citizenship, finding that he had clearly understood when he claimed relief from service that he would thereafter be barred from becoming a citizen of the United States (R. 43–47, 101 F. Supp. 446). The court recited, as part of the statement of facts, that petitioner had been lawfully admitted to the United States in 1949 (R. 43–44).

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[4] Thereafter, petitioner re-entered the United States on 11 occasions upon presentation of re-entry permits, his last entry being on July 5, 1952 (R. 8).

The Court of Appeals for the Second Circuit affirmed the judgment of the District Court (200 F. 2d 730), and a petition for a writ of certiorari was denied by this Court on March 16, 1953 (345 U. S. 918).

In March 1953, deportation proceedings were instituted against petitioner under Sec. 241 (a) (1) of the Immigration and Nationality Act of 1952 on the ground that at the time of his last entry, on July 5, 1952, he was excludable as a person ineligible to citizenship. The hearings were postponed at petitioner's request from June 29, 1953, to July 6 and then to July 14. On that last date, when counsel stated that he had insufficient time to prepare, the hearing officer replied that if, at the conclusion of the hearing, counsel felt he needed additional time, the hearing officer would consider a request for adjournment (Immigration file E086415, deportation proceedings of July 14, 1953, p. 7). Documentary evidence was introduced by both sides, including, for petitioner, the transcript of the record in the naturalization proceedings in the Southern District of New York, and petitioner himself testified. No request for a further hearing was made.

Petitioner's counsel asked that the record be kept open for the introduction of documents (including a police certificate, character letters, and an application for suspension of deportation). The request was granted and the documents were later made a part of the record (Immigration file E086415, documents marked Exs. 22–26 and p. 18 in deportation proceedings of July 14, 1953). The following colloquy then took place:

> Special Inquiry Officer to Counsel: Am I to understand that you have no additional evi-

dence to present or questions to put to respondent [petitioner] at this time?

By Counsel: That is correct. I do want an opportunity to submit a brief.

Special Inquiry Officer [to] Counsel: An opportunity to submit a brief will be offered at such time as I have prepared a decision in this case and the same has been served upon you. Do you understand?

By Counsel: Yes, sir. [Immigration file E086415, deportation proceedings of July 14, 1953, p. 19.]

Petitioner's counsel transmitted for the attention of the Special Inquiry Officer a 2½-page letter, dated August 3, 1953, in which he urged that the lawfulness of the petitioner's entry in 1949 had been in issue in the naturalization proceeding, had been adjudicated, and was *res judicata*, and that therefore the deportation proceedings should be cancelled. This letter bears the stamp "Expulsion section [of the Immigration and Naturalization Service] Received Without File, August 4 and 13, 1953 and August 21, 1955" and the stamp "Received Files Unit on August 11 and 17, 1953" (Immigration file E086415, letter dated August 3, 1953). On September 3, 1953, the special inquiry officer, upon an examination of all the evidence, concluded that petitioner was deportable as an alien ineligible to citizenship at the time of entry, ineligible for suspension of deportation but entitled to voluntary departure. (Immigration file E086415, Decision of special inquiry officer in deportation proceedings of July 14, 1953, pp. 2, 3, 4).

The Board of Immigration Appeals, in its opinion filed September 3, 1954 (R. 9–11), referred to "counsel's contentions in his brief and at the oral argument * * *." It ruled that the reference in the naturalization proceedings to petitioner's entry for permanent residence were mere recitals, and not an adjudication that such entry was legal; that the Attorney General's 1949 decision—that application for relief from service had been made under mistake—had been overruled by the subsequent judicial determination in the naturalization proceeding; and that petitioner did not, by the Attorney General's action, acquire a right to remain in the United States.

ARGUMENT

Section 241 (a) of the Immigration and Nationality Act of 1952 requires that an alien, who, at the time of entry, was excludable "shall, upon the order of the Attorney General, be deported". Section 13 (c) of the Immigration Act of 1924 (which was the law in effect up to July 1952, when petitioner last entered the country) provided that "no alien ineligible to citizenship shall be admitted to the United States." The federal courts, in petitioner's naturalization proceeding, found that he became ineligible to citizenship at the time he applied for relief from military service in March 1943, thus in effect holding erroneous the opinion of the Attorney General in 1949 that petitioner was not ineligible to citizenship (and therefore admissible) because his application for relief from service had been made under mistake. Under these circumstances, as the courts below found, the deporta-

tion of petitioner is now required by the immigration statute.

1. The argument that the opinion of the District Court in the naturalization proceeding was an adjudication that petitioner had been lawfully admitted for permanent entry, because the court happened to refer to his 1949 admission as lawful, is manifestly unsound. The only matter considered and determined in that proceeding was whether petitioner's claim to exemption from military service rendered him ineligible for the citizenship he sought. Having found him ineligible, the court had no occasion to adjudicate the lawfulness of the entry. It was of course true that petitioner had been admitted in 1949 in the belief that he could be admitted for permanent residence, and the District Court properly mentioned that fact. But there was no adjudication of that issue. In fact or, a finding of lawful entry would have been completely inconsistent with the court's holding that petitioner became ineligible for citizenship by the filing of his application for relief from military service in 1943.

2. Petitioner also argues that the Attorney General's administrative ruling in 1949 that petitioner's status could be adjusted and petitioner permitted to enter the United States, because he was not ineligible to citizenship, should remain binding now to bar deportation, despite the contrary judicial holding in the naturalization proceeding that petitioner became ineligible to citizenship in 1943. In other words, he argues that the government is estopped by the prior

ruling even though the courts have found it to have been erroneous.

If the 1949 administrative decision had been overturned in some proceeding for direct judicial review, it is indisputable that the ruling would not now be a bar to the present deportation proceeding. The court's decision would plainly control. Here, there was no direct review, but the holding in the naturalization action, in 1951–1952, constituted in effect an overruling of the administrative determination. In these circumstances, the doctrine of equitable estoppel, which petitioner urges should be applied, has no bearing. That principle is, in any case, applied to the government only under exceptional conditions and when reliance has properly been placed upon the governmental action. It certainly cannot be applied to commit the government to an interpretation of the law which the courts have found erroneous in a case involving this very petitioner, or to estop the government from now enforcing the law correctly against him. The Attorney General's 1949 ruling was a mistake of law as to the applicability of Section 3 (a) of the Selective Training and Service Act of 1940 to petitioner. That ruling, which the courts have found wrong in an action brought by petitioner himself, cannot now prevent the government from enforcing the congressional will. Cf. *Utah Power and Light Co.* v. *United States,* 243 U. S. 389, 408–409; *United States* v. *California,* 332 U. S. 19. 39–40; *Snyder* v. *Buck,* 340 U. S. 15, 19; *United States* v. *State of Washington,* 233 F. 2d 811, 817 (C. A. 9); *United States* v. *Watkins,* 165 F. 2d 1017, 1019 (C. A. 2);

Swiss Nat. Ins. Co. v. *Crowley,* 136 F. 2d 265, 267 (C. A. D. C.), certiorari denied, 320 U. S. 763; *Schafer* v. *Helvering,* 83 F. 2d 317, 319–320 (C. A. D. C.), affirmed, 299 U. S. 171; *American Surety Co.* v. *United States,* 112 F. 2d 903, 906 (C. A. 10).[5]

Moreover, petitioner has not demonstrated that he relied to his detriment upon the prior determination of the Attorney General in 1949—and such reliance is a *sine qua non* for the application of the doctrine of equitable estoppel. The ruling granted petitioner a benefit which he sought; it did not impose a detriment. He is deportable now, of course, but then he was also deportable (prior to the erroneous determination) for the reason that he had stayed beyond the period for which he was admitted. His situation is otherwise the same, in general. He had friends in this country prior to 1949, as well as now. He was president of his corporation in 1943 and continues to be. He owned a Swedish corporation in 1943 and, so far as the record shows, continues to own it. He held property in Sweden in 1943 and his mother now has it (R. 42, 30; Immigration file E086415, documents marked Exs. 5, 18, and 23 in deportation proceedings of July 14, 1953). The only substantial difference between his

[5] The case of *United States* v. *Certain Parcels of Land,* 131 F. Supp. 65, 73 (S. D. Calif.), cited by petitioner (Pet. 10), recognized that "It is impossible * * * for an agent to have authority to bind the Government, or anyone for that matter, contrary to law." The case of *Vestal* v. *Commissioner of Internal Revenue,* 152 F. 2d 132 (C. A. D. C.) also cited by petitioner (Pet. 10), was decided on the basis that the government was bound on the theory of election, rather than equitable estoppel, and noted that no erroneous interpretation of a statute was involved. 152 F. 2d at 135, 137.

business and personal situation in 1949 and at present is his marriage, but he has not shown that either he or his wife entered into marriage in reliance on the 1949 determination.[6]

3. Petitioner's allegation of denial of due process (Pet. 6–9) is grounded solely on his contention that he should have been allowed to argue orally, and file a brief before the special inquiry officer, on the legal question of whether his lawful admission to this country for permanent residence was rendered *res adjudicata* by prior administrative and judicial determination.[7] He does not deny that the full facts to support this legal argument were a part of the record considered by the special inquiry officer, and that he requested the special inquiry officer to cancel the deportation proceeding on the ground that he had

[6] Administrative *res adjudicata* cannot be applied to this deportation proceeding (Pet. 16–17). This is the first time a deportation proceeding has been instituted against petitioner on the ground that he was excludable at the time of his entry, and therefore deportable. In any event, it is well settled that decisions with respect to the exclusion and expulsion of aliens "cannot constitute *res judicata* in a technical sense." *Pearson* v. *Williams*, 202 U. S. 281, 284–285. See also, *Bridges* v. *United States*, 199 F. 2d 811, 826 (C. A. 9), reversed on other grounds, 346 U. S. 209; *Flynn* v. *Ward*, 95 F. 2d 742 (C. A. 1); *In re Wing*, 124 F. Supp. 492, 494 (N. D. Cal.); *United States ex rel. Vajta* v. *Watkins*, 88 F. Supp. 51, 54 (S. D. N. Y.). Cf. *Wilbur* v. *United States*, 281 U. S. 206, 217.

[7] Even though the special inquiry officer stated at the hearing that an opportunity to submit a brief would not be offered until he had prepared his decision, there is nothing in the record to indicate that the special inquiry officer, before rendering his decision, did not consider petitioner's brief on this legal point, which was sent by petitioner to the special inquiry officer in the form of a two and a half page letter (see the Statement, *supra*, p. 11).

been lawfully admitted in 1949 and 1952, which request, in effect, placed the *res adjudicata* argument before the special inquiry officer for consideration. Nothing in either the applicable statute or the regulations, which specify in great detail the exact procedure to be followed in a deportation hearing (*supra,* pp. 3–4, 5–7), indicates that oral argument or briefs on legal points are a part of due process to be accorded the alien at that part of the deportation proceeding held by the special inquiry officer.[8] Instead, the regulations provide that oral argument should be heard by the Board of Immigration Appeals, on request, and that briefs in support of an appeal may be submitted to the Board (8 C. F. R. §§ 6.1 (e) and 6.11 (a) (*supra,* pp. 6–7)). That was the exact procedure followed in this case. Petitioner thus had the full measure of due process accorded to him by the statute. See *Marcello* v. *Bonds,* 349 U. S. 302, 310, holding that the administrative hearing provisions outlined in Section 242 of the Immigration and Nationality Act of 1952 (*supra,* pp. 3–4) constitute the sole and exclusive procedure to be followed in deportation proceedings.

Unlike the case of *United States ex rel. Brzovich* v. *Holton,* 222 F. 2d 840 (C. A. 7), cited by petitioner (Pet. 8), this case presents no issues involving findings as to facts or credibility of witnesses, which would be binding on the Board of Immigration Appeals if supported by reasonable, substantial and

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[8] The regulations do specifically provide that an alien may submit a brief in support of objections to the exclusion of evidence. 8 C. F. R. (1952 ed.) § 242.53 (b) (*supra,* p. 5).

probative evidence. In *Brzovich* the Seventh Circuit expressed the view that the Board is endowed only with the typical reviewing function, and thus recognized that it was the final administrative authority as to questions of law. 222 F. 2d 843–845.[9] Whether or not the Board's functions as to fact-finding are so limited, it is clear that only a pure question of law is presented here. Since the legal issue was finally decided only after a full presentation of argument, both written and oral, and by the final administrative authority in the matter, petitioner not only has been accorded due process, but could not have been harmed by possible failure of the special inquiry officer to read petitioner's brief before rendering his decision, or to hear oral argument on this legal point.[10] Cf.

[9] Cf. *Ng Yip Yee* v. *Barber*, 225 F. 2d 707, 708 (C. A. 9), cited by petitioner (Pet. 8), which is of similar import.

[10] The cases of *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, and *Morgan* v. *United States*, 298 U. S. 468, cited by petitioner as conflicting with the decision below (Pet. 6, 7, 8), involved facts and issues of a different type than is involved here and do not conflict in principle with the decision of the lower courts. In *Sung*, this Court decided that Congress intended the Administrative Procedure Act to apply to deportation hearings, so that the practice of the Immigration Service of having inspectors who conduct investigations of like cases preside at deportation hearings was invalid. As petitioner points out (Pet. 7), a full hearing before the Board of Immigration Appeals could not cure the defect found by this Court in *Sung* since the presiding inspector there had to decide questions of fact, as well as those of a purely legal import, such as is involved here. In *Morgan*, the issue was whether the statutory requirements of a hearing to fix rates was met when the Secretary of Agriculture, who fixed the rates, did not hear or read the evidence but made his order upon the basis of consultation with others. In this case both the special inquiry officer and the Board of Immigration Appeals heard and read all the evidence before rendering their decision.

Opp Cotton Mills v. *Administrator,* 312 U. S. 126, 152–153, in which this Court stated:

> The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective * * *.

CONCLUSION

For the foregoing reasons, we respectfully submit that this petition for a writ of certiorari should be denied.

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